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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GENARO SMITH-BALTIHER, Defendant.	Criminal Case No. 07CR3161-LAB DATE: January 7, 2008 TIME: 2:00 p.m. UNITED STATES' RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS TO: (1) COMPEL DISCOVERY; (2) DISMISS INDICTMENT DUE TO ALLEGED MISINSTRUCTION OF GRAND JURY; AND (3) GRANT LEAVE TO FILE FURTHER MOTIONS TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW, the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and Paul L. Starita, Assistant United States Attorney, and hereby files its Response and Opposition to Defendant's above-referenced motions together with Statement of Facts and Memorandum of Points and Authorities. This Response and Opposition is based upon the files and records of the case.

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I

STATEMENT OF THE CASE

After a failed disposition in Criminal Case No. 07CR1749-LAB, a federal grand jury in the Southern District of California returned a one-count Indictment charging defendant Genaro Smith-Baltiher ("Defendant") with being a deported alien found in the United States, in violation of Title 8, United States Code, Section 1326, on November 20, 2007. In the instant case, Defendant was arraigned on the Indictment on December 3, 2007, and entered a plea of not guilty.

II

STATEMENT OF THE FACTS

On June 4, 2007, San Diego police officers arrested Defendant for disorderly conduct, being drunk in public, and booked him into the Central Detention Facility in San Diego, California. On June 5, 2007, Immigration Enforcement Agent Meraz encountered Defendant at the Detention Facility and conducted a field interview. During this interview, Agent Meraz determined that Defendant was a citizen and national of Mexico with no legal right to enter or remain in the United States. Subsequently, an Immigration detainer was placed on Defendant.

On June 6, 2007, at approximately 6:00 a.m., Defendant was referred to the custody of United States Immigration and Customs Enforcement. At this time, Deportation Officer Balangue performed records checks and confirmed Defendant's identity, that he is a citizen and national of Mexico, that he had been previously deported from the United States on numerous occasions, and that he had not applied for permission to re-enter the United States. Subsequently, Defendant was advised of his Miranda rights and he elected to invoke his right to counsel.

III

POINTS AND AUTHORITIES

A. PRODUCTION OF DISCOVERY AND PRESERVATION OF EVIDENCE

The United States has and will continue to fully comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act (18 U.S.C. § 3500), and Rule 16 of the Federal Rules of Criminal Procedure. To date, the United States has produced 363 pages of discovery to Defendant's counsel, including investigative reports and Defendant's statements. Also, the United

States has produced a voluminous amount of discovery on similar issues in Defendant's previous cases in this District.

1. Defendant's Statements

The United States will disclose to Defendant the substance of any relevant oral statement made by Defendant, before or after arrest, in response to interrogation by a person Defendant knew was a government agent if the United States intends to use the statement at trial. The United States will also disclose and make available for inspection, copying or photographing the following: (1) any relevant written or recorded statement by the defendant if the statement is within the United States' possession, custody, or control, and the attorney for the United States knows--or through due diligence could know--that the statement exists,[1/] (2) that portion of any written record containing the substance of any relevant oral statement made before or after arrest if Defendant made the statement in response to interrogation by a person Defendant knew was a government agent, and (3) Defendant's recorded testimony before a grand jury relating to the charged offense, if any.

2. Arrest Reports and Notes

The United States has already produced to Defendant all reports and notes known to the United States relating to Defendant's arrest in this case and will continue to comply with its discovery obligations.

3. Brady Material

The United States has complied and will continue to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963).

4. Prior Record

The United States has provided Defendant with a copy of Defendant's known prior criminal record under Rule 16(a)(1)(D). See United States v. Audelo-Sanchez, 923 F.2d 129, 130 (9th Cir. 1990). Should the United States determine that there are any additional documents pertaining to Defendant's prior criminal record, those will be promptly provided to Defendant.

[1/] However, "the Government is not obligated by Rule 16(a) to anticipate every possible defense, assume what the defendant's trial testimony...will be, and then furnish the defendant with otherwise irrelevant material that might conflict with the defendant's testimony." United States v. Gonzalez-Rincon, 36 F.3d 859, 865 (9th Cir. 1994) (citation omitted).

5. 404(b) Material

The United States will disclose, in advance of trial, the general nature of any "other bad acts" evidence that the United States intends to introduce at trial pursuant to Federal Rule of Evidence 404(b).

6. Evidence Seized

The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy all evidence seized that is within its possession, custody, or control, and that is either material to the preparation of Defendant's defense or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant.

7. Preservation of Evidence

The United States has no opposition to a preservation order.

8. Tangible Objects

The United States has complied and will continue to comply with Rule 16(a)(1)(E) in allowing Defendant an opportunity, upon reasonable notice, to examine, inspect, and copy tangible objects that are within its possession, custody, or control, and that is either material to the preparation of Defendant's defense or is intended for use by the United States as evidence during its case-in-chief at trial, or was obtained from or belongs to Defendant. The United States, however, need not produce rebuttal evidence in advance of trial. See United States v. Givens, 767 F.2d 574, 584 (9th Cir. 1984).

9. Witnesses

The United States will provide a list of witnesses in its trial memorandum, including law enforcement witnesses. The grand jury transcript of any person who will testify at trial will also be produced.

10. Jencks Act Material

The United States will comply with its discovery obligations under the Jencks Act, Title 18, United States Code, Section 3500, and as incorporated in Rule 26.2.

11. Giglio Material

The United States has complied and will continue to comply with its discovery obligations under Giglio v. United States, 405 U.S. 150 (1972).

12. Reports of Examinations and Tests

The United States will provide Defendant with any scientific tests or examinations in accordance with Rule 16(a)(1)(F).

13. Henthorn Material

The United States will comply with its obligations under United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991), and request that all federal agencies involved in the criminal investigation and prosecution review the personnel files of the federal law enforcement inspectors, officers, and special agents whom the United States intends to call at trial and disclose information favorable to the defense that meets the appropriate standard of materiality. United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002) (citing United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992)). If the undersigned Assistant U.S. Attorney is uncertain whether certain incriminating information in the personnel files is "material," the information will be submitted to the Court for an in camera inspection and review.

14. Cooperating Witnesses

At this time, the United States is not aware of any confidential informants or cooperating witnesses involved in this case. The Government must generally disclose the identity of informants where: (1) the informant is a material witness, and (2) the informant's testimony is crucial to the defense. Roviaro v. United States, 353 U.S. 53, 59 (1957). If there is a confidential informant involved in this case, the Court may, in some circumstances, be required to conduct an in camera inspection to determine whether disclosure of the informant's identity is required under Roviaro. See United States v. Ramirez-Rangel, 103 F.3d 1501, 1508 (9th Cir. 1997). If the United States determines that there is a confidential informant or cooperating witness who is a material witness with evidence helpful to the defense or essential to a fair determination in this case, the United States will either disclose the identity of the informant or submit the informant's identity to the Court for an in camera inspection.

15. Expert Witnesses

The United States will comply with Rule 16(a)(1)(G) and provide Defendant with a written summary of any expert testimony that the United States intends to use during its case-in-chief at trial under Federal Rules of Evidence 702, 703 or 705.

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B. THE INDICTMENT SHOULD NOT BE DISMISSED FOR ALLEGED MISINSTRUCTION OF THE GRAND JURY

The United States incorporates by reference its response and opposition regarding the exact issue in United States v. Covarrubias, 07CR0491-BTM, and United States v. Jimenez-Bermudez, 07CR1372-JAH, and asks this Court to take judicial notice of the rulings in these cases.

C. LEAVE TO FILE FURTHER MOTIONS

The United States does not object to the granting of leave to file further motions as long as the order applies equally to both parties and any additional defense motions are based on newly discovered evidence or discovery provided by the Government subsequent to the instant motion.

IV

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Defendant's motion.

DATED: December 17, 2007

Respectfully Submitted,

KAREN P. HEWITT
United States Attorney

/s/ Paul L. Starita
PAUL L. STARITA
Assistant U.S. Attorney
Attorneys for Plaintiff
United States of America
Email: paul.starita@usdoj.gov

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GENARO SMITH-BALTIHER, Defendant.	Case No. 07CR3161-LAB CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, PAUL L. STARITA, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of United States' Response and Opposition to Defendant's Motions to: compel discovery; dismiss indictment due to alleged misinstruction of the grand jury; and grant leave to file further motions; together with statement of facts and memorandum of points and authorities on the following by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Joseph M. McMullen, Esq.
   Federal Defenders of San Diego, Inc.
   Attorneys for Defendant

   joseph_mcmullen@fd.org

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

1. N/A.

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 17, 2007.

/s/ Paul L. Starita
PAUL L. STARITA